STATE OF MICHIGAN

IN THE SUPREME COURT

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff—Appellee,

vs.

Supreme Court No. 152713
Court of Appeals No. 318854
Lower Court No. 11-001804-FC

JUSTIN TIMOTHY COMER,

Defendant—Appellant.
_____/

PLAINTIFF-APPELLEE'S SUPPLEMENTAL BRIEF

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STATEMENT OF JURISDICTION

The Defendant was resentenced in the 31st Circuit Court on April 29, 2013. He sought leave to appeal in the Court of Appeals on October 28, 2013, which was denied in an Order dated January 27, 2014. This Court remanded the case to the Court of Appeals on February 4, 2015, for consideration as on leave granted. The Court of Appeals affirmed his sentence in an Opinion dated October 8, 2015. The Defendant filed another Application for Leave to Appeal on November 24, 2015. This Court ordered oral argument on the Application on April 1, 2016. This Court has jurisdiction over the Defendant's Application for Leave to Appeal pursuant to MCR 7.301, as it is an appeal after a decision by the Court of Appeals.

STATEMENT OF QUESTIONS INVOLVED

I. Does MCL 750.520n require that the Defendant, who pled guilty CSC 1st under MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring?

The trial court answered: YES
The Plaintiff-Appellee answers: YES
The Defendant-Appellant answers: NO

II. Was the trial court authorized to amend the Defendant's judgment of sentence on its own initiative, in the absence of a motion filed by any party, without limitation of time?

The trial court answered: YES
The Plaintiff-Appellee answers: YES
The Defendant-Appellant answers: NO

INTRODUCTION

Justin Comer sentenced for his CSC 1st conviction did not initially include a provision for electronic monitoring. The trial court, without a motion by either party, resentenced Mr. Comer, adding the lifetime electronic monitoring. This case presents two issues: 1) whether he is subject to electronic monitoring based on the languge of MCL 750.520b and MCL 750.520n where his victim was over the age of 13; and 2) whether the trial court properly corrected his sentence to include lifetime electronic monitoring without a motion by a party months after he was initially sentenced.

Lifetime electronic monitoring was properly imposed because the CSC 1st statute, MCL 750.520b, contains no limiting language in terms of the age of the victim in requiring trial courts to impose monitoring. This is significant because the CSC 2nd statute does contain such limiting language. The "last antecedent" rule of statory construction also supports the conclusion that the limiting language in the electronic monitoring statute, MCL 750.520n, applies only to CSC 2nd convictions because the reference to CSC immediately precedes the language that limits electronic monitoring to cases where the victim was under the age of 13.

The trial court's amendment of Mr. Comer's sentence without a motion from either party was proper as well. Based on MCR 6.429, the trial court has the authority to correct invalid sentences, and although there is a time limit placed on

the parties to file motions to correct sentences, there is no similar limit placed on the court when doing so on its own.

This Court should deny leave to appeal and affirm the decision of the Court of Appeals, as Mr. Comer has not demonstrated that the decision of the Court of Appeals affirming the trial court's amended sentence was erroneous.

STATEMENT OF FACTS

The Defendant, Justin Comer, pled guilty in the 31st Circuit Court before the Honorable James P. Adair to Criminal Sexual Conduct–First Degree and Home Invasion–Second Degree on September 2, 2011. His convictions arise out of the digital-vaginal sexual assault that he committed on a sleeping victim after he entered her home without permission on July 17, 2011. At the time of his plea, Mr. Comer was not advised that he must be sentenced to lifetime electronic monitoring required by MCL 750.520b(2)(d). Mr. Comer was sentenced on October 3, 2011, to a maximum of 18 years with credit for 77 days served on the CSC count, and 4.25 to 15 years with credit for 77 days on the home invasion count.[1] Electronic monitoring was not mentioned by the trial court at sentencing.

Mr. Comer appealed this sentence, and the Court of Appeals remanded the case for resentencing, finding that there was no evidence to support the scoring of Offense Variable 10 at 15 points for predatory conduct.[2] On October 8, 2012, the trial court resentenced Mr. Comer to a minimum of 42 months in light of the revised scoring of 10 points on OV 10.[3] Attorney Jacqueline Ouvry from the State Appellate Defender's Office represented him at the resentencing.[4] Again, neither the court nor the parties mentioned electronic monitoring.

[1] Sentencing Transcript, dated 10/3/11, p. 15
[2] Court of Appeals Order, dated June 29, 2012
[3] Resentencing Transcript, dated 10/8/12, p. 15-16
[4] Resentencing Transcript, dated 10/8/12

On January 29, 2013, the Michigan Department of Corrections sent a letter to the sentencing court because Mr. Comer's Judgment of Sentence did not contain language ordering lifetime electronic monitoring. On February 5, 2013, Ms. Ouvry sent a letter to the Honorable Michael L. West (Judge Adair's successor), in response to the MDOC letter about lifetime electronic monitoring. In the letter, Ms. Ouvry objected to the assertion that monitoring was mandatory; stated that it violated due process; suggested that the addition of electronic monitoring to his sentence would provide grounds for withdrawal of his plea; and urged the court to deny MDOC's request to correct the sentencing error.[5]

On March 14, 2013, the trial court scheduled the matter for a resentencing hearing to take place on April 29, 2013.[6] Ms. Ouvry filed an Objection to Electronic Monitoring on April 22, 2013, requesting that the trial court not amend Mr. Comer's sentence. The pleadings asserted that the lifetime electronic monitoring was not mandatory, and that the decision in *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), did not require amendment of Mr. Comer's sentence. Further, Mr. Comer argued that the lifetime electronic monitoring should have been imposed at the time of sentencing, if imposed at all. Mr. Comer also raised the issue of neither party requesting the amendment of sentence.[7]

At the hearing on April 29, 2013, Judge West acknowledged that the electronic monitoring issue was raised by the letter from MDOC, and stated that he

[5] SADO Letter, dated 2/5/13
[6] Case Register of Actions
[7] Defendant-Appellant's Objections to Electronic Monitoring, dated 4/22/13

believed that because Mr. Comer was not advised of the lifetime electronic monitoring at the time of his plea, his plea was invalid.[8] Judge West found that he was mandated to impose lifetime electronic monitoring, and gave Mr. Comer the opportunity to withdraw his plea.[9] Judge West also found that the court had the ability to correct an invalid sentence on its own at any time.[10] Mr. Comer unequivocally expressed that he did not wish to withdraw his plea.[11] Judge West then sentenced him to the same amount of incarceration as previously ordered by Judge Adair, and also sentenced him to lifetime electronic monitoring upon his release from custody.[12]

Mr. Comer, next represented by Susanna Kostovsky, filed a delayed application for appeal in the Court of Appeals, which was denied on January 27, 2014. The Defendant filed an Application for Leave to Appeal with this Court *in pro per* on March 13, 2013. This Court remanded the case to the Court of Appeals on February 4, 2015, for consideration as on leave granted.

The Court of Appeals affirmed Mr. Comer's sentence in an Opinion dated October 8, 2015.[13] Bound by the *Brantley* case, the Court of Appeals found that lifetime electronic monitoring was required. Further, the Court of Appeals found that under *People v Harris*, 224 Mich App 597, 601; 569 NW2d 525 (1997), a motion was not a condition precedent to the trial court's correction of an invalid sentence

[8] Motion Transcript, dated 4/29/13, p. 4-5
[9] Motion Transcript, dated 4/29/13, p. 6
[10] Motion Transcript, dated 4/29/13, p. 7
[11] Motion Transcript, dated 4/29/13, p. 9
[12] Motion Transcript, dated 4/29/13, p. 12
[13] *People v Comer*, 312 Mich App 538; 879 NW2d 306 (2015)

under MCR 6.429(A) and there was no time limit within which to correct such a sentence. The Defendant filed another Application for Leave to Appeal with this Court on November 24, 2015. This Court ordered oral argument on the Application on April 1, 2016, as well as the supplemental briefing contained herein. Specifically, this Court ordered that the parties address the following questions:

> (1) Whether the defendant's original sentence for first-degree criminal sexual conduct was rendered invalid because it did not include lifetime electronic monitoring, pursuant to MCL 750.520b(2)(d), i.e., whether MCL 750.520n requires that the defendant, who pled guilty to MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring, compare *People v Brantley*, 296 Mich App 546 (2012) with *People v King*, 297 Mich App 465 (2012); and
>
> (2) If so, whether the trial court was authorized to amend the defendant's judgment of sentence on the court's own initiative twenty months after the original sentencing, in the absence of a motion filed by any party. See MCR 6.429; MCR 6.435.[14]

[14] *People v Comer*, 497 Mich 957; 858 NW2d 462 (Mem) (2015)

ARGUMENT

I. MCL 750.520n requires that the Defendant, who pled guilty CSC 1st under MCL 750.520b(1)(c), be sentenced to lifetime electronic monitoring.

A. Standard of Review

Whether a defendant is subject to the statutory requirement of lifetime electronic monitoring involves a question of statutory construction, which is reviewed de novo. *People v Buehler*, 477 Mich 18, 23; 727 NW2d 127 (2007).

B. Analysis

The first issue before this Court is whether the trial court properly imposed lifetime electronic monitoring as a part of Mr. Comer's sentence for CSC 1st degree when his victim was over the age of 13. This requires an analysis of the language of both the CSC 1st statute, MCL 750.520b, and the electronic monitoring statute, MCL 750.520n.

MCL 750.520b, requires that a defendant be sentenced to lifetime electronic monitoring, in addition to other penalties. It states, in relevant part:

> (1) A person is guilty of criminal sexual conduct in the first degree if he or she engages in sexual penetration with another person and if any of the following circumstances exists:
>
> * * * * *
>
> (c) Sexual penetration occurs under circumstances involving the commission of any other felony.
>
> (2) Criminal sexual conduct in the first degree is a felony punishable as follows:

> (a) Except as provided in subdivisions (b) and (c), by imprisonment for life or for any term of years.
>
> (b) For a violation that is committed by an individual 17 years of age or older against an individual less than 13 years of age by imprisonment for life or any term of years, but not less than 25 years.
>
> (c) For a violation that is committed by an individual 18 years of age or older against an individual less than 13 years of age, by imprisonment for life without the possibility of parole if the person was previously convicted of a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age or a violation of law of the United States, another state or political subdivision substantially corresponding to a violation of this section or section 520c, 520d, 520e, or 520g committed against an individual less than 13 years of age.
>
> (d) ***In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n.***
>
> (3) The court may order a term of imprisonment imposed under this section to be served consecutively to any term of imprisonment imposed for any other criminal offense arising from the same transaction. (Emphasis added)

If MCL 750.520b(2)(d) did not refer to MCL 750.520n, it would be clear that *all* offenders convicted of CSC 1st, regardless of the age of the victim, would be subject to lifetime electronic monitoring. The issue before this Court arises in the reference to MCL 750.520n, which contains limiting language as to the age of a victim. MCL 750.520n provides:

> (1) A person convicted under section 520b or 520c ***for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age*** shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285. (Emphasis added)

The question is whether this limiting language, "for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age", applies only to the reference to MCL 750.520c, or to both MCL 750.520b and MCL 520c. The rules of statutory construction to be applied in resolving this issue are well-established, and can be summarized as follows:

> The primary goal of statutory interpretation is to ascertain the legislative intent that may reasonably be inferred from the statutory language. The first step in that determination is to review the language of the statute itself. Unless statutorily defined, every word or phrase of a statute should be accorded its plain and ordinary meaning, taking into account the context in which the words are used. We may consult dictionary definitions to give words their common and ordinary meaning. When given their common and ordinary meaning, the words of a statute provide the most reliable evidence of its intent. *Krohn v Home–Owners Ins Co*, 490 Mich 145, 156–157; 802 NW2d 281 (2011)(Citations omitted).

In general, "[s]tatutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). Single provisions should not be viewed in a vacuum. *See Manuel v Gill*, 481 Mich 637, 650; 753 NW2d 48 (2008). The object of the *in pari materia* rule is "to give effect to the legislative purpose as found in harmonious statutes." *People v Webb*, 458 Mich 265, 274; 580 NW2d 884

(1998). The Michigan Penal Code also expressly provides for its provisions to be "construed according to the fair import of their terms, to promote justice and to effect the objects of the law." MCL 750.2. Only when statutory language is ambiguous may a court look outside the statute to ascertain legislative intent. *Id.* A statutory provision is ambiguous if it irreconcilably conflicts with another provision or is equally susceptible to more than one meaning. *People v Gardner*, 482 Mich 41, 50 n 12; 753 NW2d 78 (2008).

Whether these statutes, read together, establish a requirement of lifetime electronic monitoring for those convicted of CSC 1st with a victim over the age of 13 is an issue that has divided the Court of Appeals for a number of years. Mr. Comer will undoubtedly point to the reasons expressed in *People v King*, 297 Mich App 465; 824 NW2d 258 (2012), where the majority concluded that the language of § 520n should be read as limiting lifetime electronic monitoring to those cases where the victim was under the age of 13. The People believe that the majority opinion in *People v Brantley*, 296 Mich App 546; 823 NW2d 290 (2012), is the better-reasoned approach to the issue and should be adopted by this Court.

In *Brantley*, the court focused on the "last antecedent rule" in analyzing the statute, as well as the omission of age-limiting language in the text of the CSC 1st statute, where the CSC 2nd statute did include such language. Each of these reasons is discussed below in support of the People's proposed interpretation of MCL 750.520b and MCL 750.520n.

1. The "last antecedent" rule supports interpretation of MCL 520b(2)(d) and MCL 750.520n(1) to include lifetime electronic monitoring for CSC 1st convictions involving victims of any age.

The "last antecedent" rule of statutory construction provides that "a modifying or restrictive word or clause contained in a statute is confined solely to the immediately preceding clause or last antecedent, unless something in the statute requires a different interpretation." *Stanton v Battle Creek*, 466 Mich 611, 616; 647 NW2d 508 (2002). Black's Law Dictionary defines this rule as "[a]n interpretative principle by which a court determines that qualifying words or phrases modify the words or phrases immediately preceding them and not words or phrases more remote, unless the extension is necessary from the context of the spirit of the entire writing." *Black's Law Dictionary (7th* ed)

In the text of MCL 750.520n, the last antecedent before the age-limiting language is just "520c," not "520b or 520c:"

> (1) A person convicted under section 520b or 520c for criminal sexual conduct committed by an individual 17 years old or older against an individual less than 13 years of age shall be sentenced to lifetime electronic monitoring as provided under section 85 of the corrections code of 1953, 1953 PA 232, MCL 791.285. MCL 750.520n(1)

There is nothing about the "entire writing" that suggests that the restrictive phrase was meant to modify both sections, particularly where only one of the statutes, MCL 750.520c refers to such an age restriction within its own text. MCL 750.520c(2)(b) provides:

> In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n ***if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age***. (Emphasis added)

This is the only interpretation that does not create a conflict between MCL 750.520n and MCL 750.520b(2)(d), which does not contain the limiting language in MCL 750.520c(2)(b). Instead, it includes language directing the court to sentence a defendant to lifetime electronic monitoring without qualification:

> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the defendant to lifetime electronic monitoring under section 520n. MCL 750.520b(2)(d).

2. The absence of age-limiting language in MCL 750.520b is significant and this omission was purposeful by the legislature.

As quoted immediately above, the CSC 2nd statute, MCL 750.520c, contains age-limiting language, where the CSC 1st statute, MCL 750.520b, does not. Contrasting the two provisions again, the CSC 2nd degree statute reads:

> (b) In addition to the penalty specified in subdivision (a), the court shall sentence the defendant to lifetime electronic monitoring under section 520n if the violation involved sexual contact committed by an individual 17 years of age or older against an individual less than 13 years of age. MCL 750.520c(2)(b).

This limiting language is notably absent in the CSC 1st statute:

> (d) In addition to any other penalty imposed under subdivision (a) or (b), the court shall sentence the

> defendant to lifetime electronic monitoring under section 520n. MCL 750.520b(2)(d).

As the majority pointed out in *Brantley*, the legislature could have chosen to include limiting language in the CSC 1st statute but did not:

> If the legislature had intended the age-based limitation to apply to CSC-1 Convictions, it would have so provided, given that, as MCL 750.520c(2)(b) demonstrates, it clearly was aware of how to draft the statute in a way that would have effectuated that intent. And the omission in one part of a statute of a provision that is included in another part should be construed as intentional. *Brantley*, at 558. (Citations omitted)

MCL 750.520n should not be read in isolation. Particularly where MCL 750.520b so clearly provides that the court *shall* order lifetime electronic monitoring for those convicted under MCL 750.520b, with no limiting language, and such limiting language was included in MCL 750.520c. Interpreting MCL 750.520n to apply to both MCL 750.520b and MCL 750.520c, and therefore limiting the imposition of lifetime electronic monitoring to only those cases where the victim is over 13, would render the limiting language so clearly expressed in MCL 750.520c redundant.

II. The trial court was authorized to amend the Defendant's judgment of sentence on its own initiative, in the absence of a motion filed by any party, without limitation of time.

A. Standard of Review and Preservation of Error

Questions of law, including the interpretation and application of court rules are subject to a *de novo* standard of review. *People v Cole*, 491 Mich 325, 330; 817 NW2d 497 (2012).

B. Analysis

If this Court determines that lifetime electronic monitoring does not apply to a CSC 1st conviction where the victim is over the age of 13, it need not consider this issue because the trial court's original sentence would stand and the amended sentence imposing the monitoring would be vacated. Whether the trial court had the authority to correct an invalid sentence without motion of a party would become a moot point.

Assuming that this Court finds that lifetime electronic monitoring is required in this case, this Court should also find that the trial court was authorized to amend the Defendant's Judgment of Sentence without a motion by either the prosecutor or the defense. Both MCR 6.429 and MCR 6.435 support this conclusion, and MCR 6.435 does not limit the court's exercise of the authority granted in MCR 6.429.

Court rules are construed according to the same basic principles that govern statutory construction. Where the language used in the court rule is clear and unambiguous, its plain and ordinary meaning should be applied. *People v Petit*, 466

Mich 624, 627-628; 648 NW2d 193 (2002). A court cannot read into a statute (or, similarly, a court rule) what is not there. *People v Perkins*, 473 Mich 626, 657; 703 NW2d 448 (2005).

1. MCR 6.429 expressly grants authority, without restriction, to the trial court to correct an invalid sentence.

Because Mr. Comer's sentence did not include electronic monitoring, which was required under *Brantley*, at the time he was resentenced, it was properly considered invalid by the trial court. Although MCR 6.429 provides for parties to file motions to correct invalid sentences, it does not require a motion for the court to correct an invalid sentence on its own. MCR 6.429 provides:

> **Rule 6.429 Correction and Appeal of Sentence**
>
> **(A) Authority to Modify Sentence**. A motion to correct an invalid sentence may be filed by either party. ***The court may correct an invalid sentence***, but the court may not modify a valid sentence after it has been imposed except as provided by law.
>
> **(B) Time For Filing Motion.**
>
> (1) A motion to correct an invalid sentence may be filed before the filing of a timely claim of appeal.
>
> (2) If a claim of appeal has been filed, a motion to correct an invalid sentence may only be filed in accordance with the procedure set forth in MCR 7.208(B) or the remand procedure set forth in MCR 7.211(C)(1).
>
> (3) If the defendant may only appeal by leave or fails to file a timely claim of appeal, a motion to correct an invalid sentence may be filed within 6 months of entry of the judgment of conviction and sentence.
>
> (4) If the defendant is no longer entitled to appeal by right or by leave, the defendant may seek relief pursuant to the procedure set forth in subchapter 6.500.

> **(C) Preservation of Issues Concerning Sentencing Guidelines Scoring and Information Considered in Sentencing.** A party shall not raise on appeal an issue challenging the scoring of the sentencing guidelines or challenging the accuracy of information relied upon in determining a sentence that is within the appropriate guidelines sentence range unless the party has raised the issue at sentencing, in a proper motion for resentencing, or in a proper motion to remand filed in the court of appeals. (Emphasis added)

No time restriction is included in this subrule to limit the authority granted in the second sentence of subrule (A) for a correction initiated by the court. Subrule (B) does, however, place time limits on the prosecution and the defense for the filing of motions to correct an invalid sentence. The 1989 Staff Comment also states that "Subrule (B) sets the time within which a motion for resentencing may be filed." No time limits appear in subsection (B) for the court's *own* correction of errors where no motion is filed.

A sentence may be considered invalid if the court "fails to exercise its discretion because it is laboring under a misconception of the law." *People v Whalen*, 412 Mich 166, 169; 312 NW2d 638 (1981). This is the case before this Court. At the trial court level, Judge Adair was either unaware of the change in the law, or inadvertently omitted the imposition of the mandatory lifetime electronic monitoring when sentencing Mr. Comer. Throughout the appeal period, this issue went unnoticed by the prosecution, and would not have been raised by the defense, since the omission benefitted the Defendant. The MDOC letter brought the issue to light for the trial court, and for Judge Adair's successor, Judge West. Upon learning

of the issue, Judge West sought to correct the error on his own, which MCR 6.429(A) provides for in the second sentence.

Although not binding on this court, the decision in *People v Harris*, 224 Mich App 597; 569 NW 2d 525 (1997), supports the trial court's authority to correct an invalid sentence well after the end of the defendant's appeal period, and without a motion from the prosecutor. In *Harris*, the MDOC sent a letter to the sentencing court, advising that the defendant was on escape status from the Department at the time of his sentencing offense. This was not known to the trial court because the defendant was sentenced under a different name, later discovered by the MDOC. Because of his status, a consecutive sentence should have been imposed. Upon learning of this error, the trial court forwarded the letter to the prosecution, which filed a motion for resentencing. *Harris*, at 598-599. The defendant was resentenced, and on appeal, argued that the trial court did not have jurisdiction to order resentencing. *Id.* at 599.

The *Harris* court reasoned:

> If the language of the court rule is clear, this Court should apply it as written. *Bruwer v. Oaks* (On Remand), 218 Mich.App. 392, 397, 554 N.W.2d 345 (1996). There being no time restrictions specified in MCR 6.429(A), we decline to construe this court rule as containing a jurisdictional time limitation. Therefore, there was no impediment relative to the time of the trial court's decision in the case at bar that would preclude it from ordering a resentencing pursuant to MCR 6.429(A).

While this decision obviously does not bind this Court, it should be persuasive because the interests of justice are served by the correction of those sentences that do not comport with the law. While the corrections undertaken by the Court typically benefit the defendant in a criminal matter, this Court has found that the correction of sentences has other purposes as well:

> The staff comment accompanying MCR § 6.429(A) states, "'[i]nvalid sentence' refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed." Although the staff comment seems to anticipate that a sentence will be invalid when the error operates against a defendant, sentences have been held invalid even when the error operated in a defendant's favor.
>
> ***A sentence may be invalid no matter whom the error benefits because sentencing must not only be tailored to each defendant, but also satisfy "society's need for protection and its interest in maximizing the offender's rehabilitative potential***." *People v Miles*, 454 Mich 90, 97-98; 559 NW2d 299 (1997)(citations omitted)(Emphasis added).

The *Harris* Court also found that MCR 6.429(A) does not set time limits with respect to a trial court's authority to correct an invalid sentence, and that a motion for resentencing was not a condition precedent to this type of correction, so long as the defendant's due process rights were satisfied. *Harris*, at 601.

The *Harris* Court's interpretation of MCR 6.429 adequately protects the rights of defendants because it requires a hearing before changes can be made to a sentence. The *Miles* case, cited above, addressed the due process rights that must be afforded to a defendant upon resentencing. In *Miles*, this Court considered a

situation where the defendant was sentenced on armed robbery and felony firearm charges. Neither the presentence report nor the parties discovered the existence of a prior felony firearm conviction, which required a mandatory five-year sentence, rather than a two-year sentence. The MDOC sent a letter to the court advising of the prior conviction. The trial court entered an amended judgment with the five-year term without notice to either party and without a hearing. *Id.* at 93.

On appeal to this Court, the issue presented was whether the trial court had the authority to modify the defendant's sentence sua sponte and without a resentencing hearing. *Id.* at 94. This Court found that the original sentence was "invalid and subject to modification by the court under MCR 6.429(A)," but that the trial court erred in modifying the sentence sua sponte and without a resentencing hearing because the changes to the sentence were not "purely ministerial" as the initial sentences were based on inaccurate information in the presentence report. *Id*. at 100. While this Court did find error in the sua sponte amendment of the sentence without hearing, the Opinion does not discuss the issue of whether a motion should have been filed at any point. The Opinion does discuss in detail the due process requirements of a resentencing hearing, such as a right to counsel, accurate information, and to challenge new information. This suggests that the finding of error was based on the fact that the trial court changed the defendant's sentence without a hearing, *not* based on the fact that it undertook correction of the sentence sua sponte.

Because *Miles* ensures due process to the defendant in these types of cases, while preserving the legitimate public interest of accurate sentences, this Court should find that the language of MCR 6.429 authorizes a court to amend an invalid sentence on its own initiative without limit on time.

2. MCR 6.435, while restricting the time frame that a court may correct substantive mistakes in its orders, should not be read to limit the court's ability to correct invalid sentences under MCR 6.429.

The issue of how and when a court may correct a sentence also involves discussion of MCR 6.435. Unlike MCR 6.429, which specifically applies to modification of sentences, MCR 6.435 applies to other aspects of the criminal process as well as judgments. MCR 6.435 provides the following:

> **Rule 6.435 Correcting Mistakes**
>
> (A) **Clerical Mistakes**. Clerical mistakes in judgments, orders, or other parts of the record and errors arising from oversight or omission may be corrected by the court at any time on its own initiative or on motion of a party, and after notice if the court orders it.
>
> (B) **Substantive Mistakes**. After giving the parties an opportunity to be heard, and provided it has not yet entered judgment in the case, the court may reconsider and modify, correct, or rescind any order it concludes was erroneous.
>
> (C) **Correction of Record**. If a dispute arises as to whether the record accurately reflects what occurred in the trial court, the court, after giving the parties the opportunity to be heard, must resolve the dispute and, if necessary, order the record to be corrected.
>
> (D) **Correction During Appeal**. If a claim of appeal has been filed or leave to appeal granted in the case,

> corrections under this rule are subject to MCR 7.208(A) and (B).

This rule distinguishes between clerical and substantive mistakes, and allows the court to correct clerical mistakes liberally "at any time and on its own initiative." With regard to substantive mistakes, the language of the court rule is more restrictive, requiring the parties be given an opportunity to be heard, and only until it enters a judgment in the case. Notably, subrule (A), which has no time limit, applies to "judgments, orders or other parts of the record;" yet subrule (B), which does impose a limit, pertains only to the correction, modification, reconsideration, or rescission of any "order." It does not mention judgments, or more importantly, judgments of sentence, the correction of which appears to be addressed by MCR 6.429.

Because MCR 6.429 deals specifically with correction of invalid sentences, it should control as more specific. Statutes that address the same subject or share a common purpose are *in pari materia* and must be read together as a whole." *People v Harper*, 479 Mich 599, 621; 739 NW2d 523 (2007). When two statutes are *in pari materia* but conflict with one another on a particular issue, the more specific statute must control over the more general statute. *People v Buehler*, 477 Mich 18, 26; 727 NW2d 127 (2007). The interpretation of a court rule is subject to the same principles that govern statutory construction. *Henry v Dow Chem Co*, 484 Mich 483, 495; 772 NW2d 301 (2009). Therefore, because MCR 6.429 is more specific to sentencing, and not generally applicable to all orders and judgments of the court, like MCR 6.435, it should control.

The 1989 Staff Comment to the MCR 6.435 supports this conclusion, as it ultimately directs the reader back to MCR 6.429 where a judgment has already entered. It states that "the court's ability to correct substantive mistakes under subrule (B) ends with the entry of the judgment. . . [t]his limitation does not, however, prohibit a party aggrieved by a substantive mistake from obtaining relief from a substantive mistake by using available postconviction procedures." Where a substantive mistake is sought to be corrected after a judgment is signed, the Comments next refer to MCR 6.429, noting that the defendant may obtain relief by filing a postconviction motion. Because the Comments refer to MCR 6.429 in the context of obtaining relief from a substantive mistake, the 1989 Staff Comment to MCR 6.429 becomes relevant:

> [a]lthough the trial court may not modify a valid sentence, ***it may correct an invalid sentence after it has been imposed***. See *People v Whalen*, 412 Mich 166 (1981). Invalid sentence refers to any error or defect in the sentence or sentencing procedure that entitles a defendant to be resentenced or to have the sentence changed."(Emphasis added)

This Court should read MCR 6.429 and MCR 6.435 and their comments together, because the Comments in MCR 6.435 specifically refer to MCR 6.429 to address situations where a judgment has already been entered, and because MCR 6.429 specifically addresses sentencing, whereas MCR 6.435 is more general, encompassing "judgments, orders, or other parts of the record." MCR 6.435(A). Where sentencing is concerned, MCR 6.429 gives the court the authority to act to correct an invalid sentence without a motion from either party, and without a time

limit. MCR 6.435 restricts the ability of the court to make changes to "any *order* it concludes was erroneous" before judgment, but does not state that the judgment of sentence itself cannot be modified. To the contrary, the Comments indicate that MCR 6.429 is to control where the issue arises after a judgment is signed. MCR 6.435 should not be interpreted to impose a time limit on the ability to correct an invalid sentence that is given to courts by MCR 6.429. Further support for this position exists because MCR 6.429 contains no reference to MCR 6.435, in its text or in its comments. There is nothing to indicate that MCR 6.435 was intended to limit the time frame or the ability of the court to correct invalid sentences.

3. Allowing trial courts to correct invalid sentences serves the interests of justice.

The MDOC routinely informs sentencing courts and parties of errors discovered during its role of processing and implementing the judgments of sentence imposed by the courts. Because of the interest in accurate sentences, the trial court must have a mechanism to correct its own errors, without the restriction of a time limit. MCR 6.429(A) recognizes this, giving the trial court authority to correct its own sentences, and providing time limitations only for the filing of motions, but not for corrections initiated by the court.

Reading MCR 6.435 without reference to the authority granted by MCR 6.429 essentially removes any ability of the court to correct a sentencing mistake once the judgment has been entered. The trial court would have no means to address the numerous instances where it discovers an error that the parties did not. In

addition, courts would have no way to remedy the various errors brought to light by the MDOC. Applied in this manner, MCR 6.435 would result in the perpetuation of invalid sentences.

A defendant in a criminal case can bring an invalid sentence before the court for correction under MCR 6.429 and can also seek relief beyond the time frame in MCR 6.429 by filing a motion for relief from judgment under MCR 6.502. If the prosecution wishes to raise a sentencing issue after the fact, the mechanisms are somewhat more limited, in that 6.500 relief is not available, but the prosecution does have a post-sentencing mechanism to raise issues with a sentence pursuant to MCR 6.429(A). Interpreting MCR 6.429 and MCR 6.435 as limiting the court's ability to correct invalid sentences leaves the court with no similar avenue. The sentencing court's interests differ from those of the parties when a correction to a sentence needs to be made, as the court is not an advocate, but is charged with the duty to impose an accurate and just sentence. The sentencing court would not be actively involved in the appeals process and may not learn of potential errors until much later in time, as is demonstrated by the cases where a letter from the MDOC raises a potential issue.

MCR 6.429 provides a necessary mechanism for courts to correct invalid sentences. In this case, Mr. Comer should have been sentenced to lifetime electronic monitoring, and absent the sentencing judge's omission, would have been. The fact that no one noticed or took action to correct the error prior to the court

acting on the MDOC letter should not result in the Defendant escaping a mandatory penalty that also serves to protect the community upon his release.

4. The reasoning applied by the Court of Appeals in *Lee* and *Holder* should not persuade this Court to limit the trial court's authority.

In the lower courts, and in previous briefing to this Court, the Defendant has repeatedly cited two cases: *People v Lee*, 489 Mich 289; 803 NW2d 165 (2011) and *People v Holder*, 483 Mich 168; 767 NW2d 423 (2009). The People anticipate that he will again refer to these cases to support an argument that the trial court lacked authority to modify his sentence. The reasoning of these cases should not be compelling, because neither creates a requirement of a motion by a party before a court can correct an invalid sentence.

In *Lee*, the defendant was convicted of third-degree child abuse. Based on the specific facts of the case, the prosecution believed that he should be placed on the sex offender registry under the "catch-all" provision.[15] The trial judge concluded that the record as it existed at the time of sentencing did not support registration, but left the prosecution the option to hold a hearing to present additional evidence to demonstrate that the defendant's conduct required registration. The trial court retained jurisdiction for that purpose, but issued a judgment of sentence that did not require registration. *Lee,* at 292-294.

Approximately 20 months later, the prosecution filed a motion for entry of an order requiring that the defendant be placed on the registry. By this time, a new

[15] MCL 28.722(e)(xi)

judge had taken the bench. The court held a hearing, but no testimony or evidence was presented to support the prosecution's prior assertions at sentencing that would have supported placement on the registry. The new judge, however, ruled that the defendant must register. *Id.* at 294.

The *Lee* case ultimately reached this Court, and was remanded to the Court of Appeals for consideration as on leave granted. *Id.* at 294. This Court found that the trial court erred in imposing a registration requirement after sentencing because MCL 28.724(5) clearly directs that registration as a sex offender must take place before sentencing. Relevant to the issues presently before this Court, the *Lee* decision also discussed MCR 6.429(B) and time limits:

> In this case, however, the time limits to bring a motion to correct an invalid sentence were long past. MCR 6.429 (B) sets the time limits for a motion to correct an invalid sentence, and that court rule applies to prosecutors and defendants alike because the statute governing appeals by the prosecution, MCL 770.12, does not indicate that the prosecution is entitled to seek relief beyond the time provided in the court rules. *Id.* at 299.

This Court found that the prosecution's motion was untimely in *Lee*, and that the trial court should have denied it. In reaching this decision this Court found it "notable" that the first trial judge determined that registration was not proper based on the record before the court at sentencing, and the prosecution failed to provide any new evidence to support the claims made at the first sentencing. *Id.* at 300. This Court found that the manner in which the successor judge ordered registration effectively "overruled" the prior judge's finding. *Id.*

The *Lee* decision does not support Mr. Comer's position because it was based on significantly different facts. In *Lee*, the prosecution initiated the resentencing hearing, almost two years after the original sentencing, to add a provision that was discretionary in nature to a sentence that was otherwise lawful and valid. In the present case, the court initiated a resentencing to correct a legally invalid sentence to add a mandatory punishment required by statute. The defendant in *Lee* was remanded because the prosecutor's motion was deemed untimely, and because registration was statutorily required to take place prior to sentencing. Neither of these aspects exist in Mr. Comer's case.

The second case, *People v Holder*, involved the imposition of an amended sentence initiated by the MDOC. The defendant in *Holder* had been released from parole at the time of sentencing on a new offense. After sentencing, the MDOC "cancelled" his parole discharge order, which the MDOC believed resulted in him actually being on parole at the time of his sentence. The MDOC sent a letter to the trial court asking that it issue an amended judgment of sentence as a result of the cancellation. *Id.* at 425.

In response to the letter, the trial court entered an amended judgment of sentence making the defendant's sentence consecutive to his parole, without providing notice or a hearing to either the defendant or the prosecutor. *Id.* at 426. This Court found that the MDOC's effort to retroactively cancel the defendant's parole discharge had no legal effect on his parole status. *Id.* at 173. Because the

original judgment of sentence was therefore valid when imposed, the trial court was without authority to modify it in response to the MDOC's letter. *Id.* at 177.

The *Holder* case did not specifically preclude trial courts from correcting sentences that are invalid based on issues discovered by MDOC and communicated to the court. Nor did the decision create a requirement that a motion be filed by a party before a correction can be made.

Unlike Mr. Comer's original sentence, the original sentences in *Lee* and *Holder* were *legal* and *valid*. Consequently, the trial courts in those cases had no authority to amend the sentences. Because lifetime electronic monitoring was required by MCL 750.520b(2)(d) and it was not imposed at Mr. Comer's original sentencing, his sentence was legally invalid and required correction. In light of the factual differences between Mr. Comer's case and the *Lee* and *Holder* decisions, they should not undermine the conclusion that the trial court was authorized under MCR 6.429 to correct this judgment of sentence.

RELIEF REQUESTED

WHEREFORE, for the reasons stated above, the Plaintiff—Appellee requests that this Honorable Court deny the Defendant-Appellant's request for relief and affirm the decision of the Court of Appeals.

Respectfully Submitted,

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